IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1467 OF 2005

Balu Laxman Sawant (Deceased)
through Legal representative .. Appellant

Versus

Hanmant Daji Sawant & Ors. .. Respondents

Ms.Suhasini Mutalik for appellant

CORAM : S.C.DHARMADHIKARI, J.

DATE : 18th July 2007.

P.C.

. Heard Ms.Mutalik for the appellant original defendant, who has been unsuccessful in the trial court so also lower appellate court,

while assailing the decree for declaration of share of the original plaintiff in the suit land and the house and partition and separate possession on that basis.

2. Submission of Ms.Mutalik is that burden has incorrectly been thrown upon the present appellant to establish that the properties are self-acquired properties. The submission is that in a suit which has been filed by the original plaintiff for declaration of share and for partition and separate possession, the burden is upon the plaintiff to show that the property was belonging to joint family nucleus. Such being the settled position, there is no question of burden being upon present appellant and this itself gives rise to substantial question of law.

3. There is no substance in the this contention. The common ancestor Sawant expired in the year 1934 and he was succeeded by two

sons, one of which was the original defendant and Daji, father of plaintiff. It has been stated by the plaintiff in his evidence that the deceased defendant Balu Sawant was handling and managing all the affairs and his father and the defendants were residing jointly. The father and mother were cultivating the land and after the death of the father, he and his mother were residing jointly with the defendants. In such circumstances, upon request to transfer some of the land, usual dispute started giving rise to instant suit.

4. As on the date of deposition, plaintiff was 37 years of age whereas the transaction which was put in issue by the present appellant is of the year 1934, plaintiff cannot be said to have any knowledge about it. Plaintiff’s father and deceased defendants were brothers. Considering that the deceased defendant was managing the property and that he was in a position where he

was looked upto for protection of Plaintiff's rights and when it is original defendant's case that the properties are self-acquired, then, the burden has rightly been put upon him. The reasoning of the lower appellate court in paras 13 and 14 of the impugned judgement while affirming that of the trial court shows that there are nothing but matters of appreciation of oral and documentary evidence. Consistent with the same, all findings are recorded and in my view, the conclusion reached that the defendant - appellant before me has not proved that the properties are self-acquired, does not suffer from any error apparent much less can be termed as perverse. This is not a court of further appeal permitting re-appraisal or re-appreciation of evidence. Second Appeal is dismissed. In view of disposal of the second appeal is civil application is dismissed as infructuous.

(S.C.DHARMADHIKARI, J)